

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORNELIUS TERRELL MCDANIEL,

Defendant-Appellant.

UNPUBLISHED

April 29, 2004

No. 243638

Kent Circuit Court

LC No. 01-008282-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY EARL PRICE,

Defendant-Appellant.

No. 243639

Kent Circuit Court

LC No. 01-008281-FC

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Following a joint jury trial, defendants were each convicted of second-degree murder, MCL 750.317, and sentenced to twenty to seventy-five years' imprisonment. Defendants appeal by right. We affirm.

Defendants were convicted of murdering Jose Montalvo after meeting with him to purchase marijuana. Defendants left the victim's body in a secluded area and then drove the victim's car to their home state of Alabama. The victim's body was discovered about a month later. It was too decomposed for the medical examiner to determine a specific cause of death, but defendants admitted in statements to the police and their friends that, first, they strangled the victim. Then, as the victim regained consciousness, they strangled him again until he died. Defendants stated that they argued with the victim about the price of the marijuana, but claimed they did not strangle him until after he allegedly reached for a gun. Defendants claimed that they took the victim's gun and discarded it along I-75 in Ohio as they returned home to Alabama.

Defendants were tried on charges of first-degree premeditated murder and felony murder. At trial the prosecutor theorized that the victim was unarmed when he was killed. Defendants claimed that they acted in lawful self-defense. The trial court instructed the jury that lawful self-defense was a complete defense to both first-degree murder and the lesser offense of second-degree murder. But if the jury found a realistic possibility that defendants acted in self-defense, but were doing something illegal like buying drugs, the crime would be manslaughter. The jury found defendants guilty of second-degree murder.

On appeal, both defendants challenge the manslaughter instructions the trial court gave. Our review of this instructional issue is de novo. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

We agree with defendant Price that the trial court gave a legally incorrect instruction on manslaughter. The trial court's explanation for the instruction reveals that it was attempting to explain the concept of imperfect self-defense to the jury. But lawful self-defense will justify or excuse a homicide, even when the crime charged is manslaughter. *In re Gillis*, 203 Mich App 320, 322; 512 NW2d 79 (1994). Although there are limits on a defendant's ability to claim lawful self-defense, the mere fact that a defendant was engaged in wrongful conduct does not preclude a claim of self-defense. *People v Townes*, 391 Mich 578, 592; 218 NW2d 136 (1974); see also *People v Riddle*, 467 Mich 116, 119-121; 649 NW2d 30 (2002) (discussing rules applicable in determining whether a person has a duty to retreat, rather than exercise deadly force).

In Michigan, the concept of imperfect self-defense recognizes that murder may be mitigated to voluntary manslaughter if a defendant would have been entitled to invoke lawful self-defense had he or she not been the initial aggressor. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). The focus of this mitigating factor is on the assaultive conduct itself and, in particular, the defendant's intent, not whether the defendant or the victim were engaged in some other illegal act when the killing occurred. *Kemp, supra* at 324.

Here, the trial court's manslaughter instruction did not conform to a cognizable form of imperfect self-defense as recognized in Michigan; consequently, the erroneous instruction is properly classified as a preserved, nonconstitutional error. *People v Cornell*, 466 Mich 335, 363; 646 NW2d 127 (2002). Based on our examination of the entire cause, however, we are not persuaded that the trial court's error requires reversal because it did not undermine the reliability of the jury's verdict of second-degree murder. The court's instructions made it clear that lawful self-defense was a complete defense to murder, so the manslaughter instructions were relevant only if the jury found a realistic possibility of lawful self-defense. Defendant Price has not shown that it is more probable than not that he would have been acquitted of second-degree murder if the trial court had not given the erroneous manslaughter instruction. Hence, reversal is not required. *Id.* at 364; see also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

We have also considered defendants' positions that the trial court erred by failing to instruct the jury on voluntary manslaughter based on provocation under traditional common-law principles. We note that provocation is not an actual element of voluntary manslaughter, but constitutes a circumstance that negates the presence of malice. *People v Mendoza*, 468 Mich

527, 536; 664 NW2d 685 (2003); *People v Darden*, 230 Mich App 597, 602-603; 585 NW2d 27 (1998). The provocation must cause a defendant to act out of passion, rather than reason. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). It must be such that it would cause a reasonable person to lose control. *Id.* at 389; *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), *aff'd* 461 Mich 992 (2000).

Regardless of whether we examine the evidence in this case under the pre-*Cornell* standard applicable to cognate lesser offenses or by viewing voluntary manslaughter as a necessarily included lesser offense of murder and employing the rational view of the evidence standard set forth in *Cornell* and *Mendoza*, *supra*, we conclude that the trial court properly declined to instruct on voluntary manslaughter based on provocation. The alleged provocation in this case was that the victim was reaching for a gun. If believed, however, this evidence did not suggest that defendants were acting out of a loss of control, but rather that they lunged and grabbed the victim in self-defense. Because the evidence would not have supported a conviction for voluntary manslaughter based on provocation, the trial court properly refused to instruct on that offense.

The other two issues raised by defendant McDaniel do not provide a basis for relief. First, examining the jury instructions in their entirety, the tenor of the instructions did not have the effect of shifting the burden of proof to defendants to prove self-defense. *Milton*, *supra* at 475. The jury was instructed that the prosecutor had the burden of proof, that the evidence must establish defendants' guilt beyond a reasonable doubt, and that defendants were not obligated to prove that they acted in self-defense. Both before and after the phrase "adequately established," the trial court instructed the jury that the evidence must prove defendants "did not act in self-defense." Considered in context the trial court's use of the phrase "adequately established" referred to what the evidence would establish, not a defense burden. We note that the trial court appropriately used the phrase "realistic possibility" to explain the circumstances under which the jury should acquit defendants of murder based on self-defense. *People v Bowman*, 254 Mich App 142, 149-150; 656 NW2d 835 (2002). Therefore, defendant McDaniel has failed to show plain instructional error with regard to this unpreserved issue. *Carines*, *supra* at 763.

Second, from our review of the record, defendant McDaniel has established no support for his claim of ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). Further, this Court previously denied defendant McDaniel's motion to remand for an evidentiary hearing with regard to this issue. Based on our review of the record, we are likewise not persuaded that a remand is warranted. The record reflects that both defendants had a full opportunity to inform the police of the approximate location where they allegedly discarded the victim's gun along I-75 in Ohio, but they could only provide information about the speed they were driving and an estimated location of about thirty miles or minutes south of Piqua, Ohio. Defendant McDaniel's contention that he told his attorney that he would be able to direct the police to within five or ten miles of where the gun was discarded, adds little to the information the police already had. It does not reflect the type of specific location that Wyoming Police Officer Jesse Lopez testified that he was seeking. Nor does it provide any basis for concluding that the police would have either found the gun or linked it to the victim. Because nothing in the record suggests that a further elucidation of facts would establish the requisite deficient performance or prejudice

necessary to establish a claim of ineffective assistance of counsel, we reject defendant McDaniel's request to remand this case for an evidentiary hearing regarding his claim.

Finally, both defendants seek resentencing on the ground that the trial court erroneously scored the statutory sentencing guidelines. In general, we review a trial court's scoring decision for an abuse of discretion and will uphold the decision if there is any evidence to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review issues concerning the proper interpretation of statutory sentencing guidelines de novo. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

We find it unnecessary to address defendant Price's claim that offense variable (OV) 6, MCL 777.36, should have been scored at ten points, not twenty-five. A fifteen point reduction would not have affected the sentencing guidelines range. See *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). Nonetheless, we note that the evidence in this case would have allowed the trial court to accept defendants' statements that they strangled the victim, but still reject their claim that they reacted because the victim was reaching for a gun. Without a gun, the evidence merely presents a scenario in which defendants overpowered and worked together to strangle the victim. The victim's struggle while being strangled, especially a second time, did not amount to a combative situation. Cf. *People v Rodriguez*, 212 Mich App 351, 354; 538 NW2d 42 (1995). Hence, the evidence supports the trial court's score of twenty-five points for OV 6.

Both defendants challenge the trial court's score of fifty points for OV 7, MCL 777.37, which applies to all crimes against persons. MCL 777.22(1). Because the trial court's sentencing decision reflects that it would have departed from the sentencing guidelines range and imposed the same sentence even if OV 7 were not scored at fifty points, we again find no basis for resentencing. The trial court's stated reasons for departing from the sentencing guidelines range in that instance were substantial and compelling. MCL 769.34(11); *Babcock*, *supra* at 260, 271; see also *People v Mutchie*, 468 Mich 50; 658 NW2d 154 (2003).¹

We affirm.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens

¹ In passing, we note that defendants' reliance on *People v Hernandez*, 443 Mich 1; 503 NW2d 629 (1993), as support for their claim that OV 7 was improperly scored is misplaced. Although the Supreme Court upheld the trial court's determination of "excessive brutality" in that case, it did not attempt to judicially define the limits of that term for all forms of physical abuse. Rather, the court conducted a fact-specific analysis as to whether the beating suffered by the assault victim in that case constituted excessive brutality.